Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1861

ROBERT W. EPP and RAY B. FOSTER,

Petitioners,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

The petitioners, Robert W. Epp and Ray B. Foster, pray that a writ of certiorari issue to review the opinion and judgment of the Superior Court, Appellate Division of the State of New Jersey on December 14, 1979.

Opinions Below

The opinion of the Superior Court, Appellate Division, unreported, appears at Appendix A. The Supreme Court of the State of New Jersey denied a petition of certification on February 26, 1980. Appendix B.

Jurisdiction

The opinion of the Superior Court, Appellate Division, of the State of New Jersey was entered on December 14, 1979. A petition for certification of said opinion was denied by the Supreme Court of the State of New Jersey on February 26, 1980.

This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Question Presented

The defendants vehicle, was stopped and arrested by a State Police Officer while travelling on the New Jersey Turnpike. Subsequent to their arrest, the police officer, without a warrant and absent exigent circumstances, seized and opened the closed luggage of Defendants contained in the car. The question thereby arising is:

1. Does the rationale of *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) apply retroactively thereby rendering the instant warrantless search and seizure illegal?

Constitutional Provision Involved

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statement of Facts

On February 4, 1977, the defendants were travelling on the New Jersey Turnpike when they were stopped by a Trooper of the New Jersey State Police for an alleged defective brake light. Upon stopping the vehicle and examining the valid driver's license of defendant Epp, the Trooper and defendant Epp went to the rear of the vehicle and engaged in conversation respecting the defective brake light. At said time the officer requested defendant Epp to open the trunk, which he did.

Upon the opening of the trunk, the Officer testified he smelled a strong odor of unburned marijuana. According to the Trooper's testimony, within the trunk were four (4) suitcases and two duffel bags. The Trooper testified that all the articles of luggage were closed and the suitcases were locked. Subsequently, the Trooper observed a green bag sticking out of one of the duffel bags which he pressed against with his hand and heard the crushing of stalks. He then inserted his finger through the bag and pulled out suspected reside of marijuana.

The Trooper then arrested, handcuffed and placed the defendants in the police car. He then searched the glove compartment of the defendants' vehicle and found the keys to the suitcases located in the trunk. A search of the closed luggage was made at the scene which revealed a quantity of marijuana therein. The search of the luggage was made on the New Jersey Turnpike, after defendants were placed under arrest and without a warrant.

The parties were subsequently charged with possession of marijuana and possession of same with intent to distribute contrary to N.J.S.A. 24:21-20(a.4) and N.J.S.A. 24:21-19(a.1).

Procedural History

Subsequent to their arrest, the defendants were indicted for the foregoing violations. Upon entry of not guilty pleas, timely motions to suppress the evidence were filed alleging that said searches were violative of the defendants Federal Constitutional rights. Following an evidential hearing on the motions to suppress, the trial judge issued an order denying said motions. At said hearing defense counsel expressly argued the same rationale which later appeared in the rulings of *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) in support of their request to suppress. Upon a hearing for reconsideration held on January 19, 1979, the trial court affirmed its prior decision.

On January 23, 1979, the defendants, pursuant to N. J. Court Rules R. 3:5-7(d), entered pleas of guilty to the charges while reserving their right to appeal denial of their motions to suppress. The defendants were sentenced to imprisonment for 364 days in the County jail, four months to be served with balance suspended; three years probation; and a fine in the sum of $7,500 payable over the probationary period.

A timely appeal was taken by the defendants to the Superior Court, Appellate Division of the State of New Jersey which affirmed the judgment of the trial court on December 14, 1979. The Appellate Division found the case to be within the rationale of *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) but would not apply the decision retroactively. If it were so applied, the Appellate Court expressly stated the search was illegal.

Review of said decision was requested by the defendants to the State Supreme Court of New Jersey which denied a Petition for Certification to the Superior Court, Appellate Division, on February 26, 1980. Appendix B.

Reasons for Granting the Writ

The decision of the Superior Court, Appellate Division is contrary to the principles of the United States Constitution, Amendment IV as expressed in *Arkansas* v. *Sanders,* 422 U.S. 573 (1979).

In *Arkansas* v. *Sanders,* 422 U.S. 573 (1979) this Court held that in the absence of exigent circumstances, police are required to obtain a Warrant before searching luggage taken from an automobile which had been stopped and searched for contraband. The Superior Court, Appellate Division (Appendix A) expressly held that if *Sanders* is applicable the search and seizure herein was illegal. The Court did not deem it applicable solely because of its opinion on the non-retroactive nature it gave to the *Sanders* opinion, *supra.*

Conflicting opinions exist throughout the country as well as the State of New Jersey with regard to the *Arkansas* v. *Sanders,* 422 U.S. 537 (1979) opinion. *See U.S.* v. *Schleis,* 433 U.S. 905 (1977), on remand, 582 F.2d 1166 (8th Cir. 1978) (en banc); *U.S.* v. *Calandrilla,* 469 F.2d 1973 (6th Cir. 1979); *U.S.* v. *Dien,* 609 F.2d 1038 (2nd Cir. 1979); *Compare State* v. *Pace,* 171 N.J. Super. 240 (App. Div. 1979); *State* v. *Parker,* 153 N.J. Super. 481 (App. Div. 1977); *State* v. *Carpentieri,* 168 N.J. Super. 589 (App. Div. 1979), certif. granted 81 N.J. 344 (1979); *State* v. *Mann,* 171 N.J. Super. 173 (App. Div. 1979).

The most recent opinion in *U.S.* v. *Dien,* 609 F.2d 1038 (2nd Cir. 1979) correctly describes the Court's holding in *Arkansas* v. *Sanders,* 422 U.S. 537 (1979) as merely a clarification and not a change of Fourth Amendment principles.

At the time of the filing of this petition the defendants are in custody serving their sentence solely in consequence of conflicting case law pertaining to the retroactive effect of *Arkansas* v. *Sanders,* 422 U.S. 537 (1979). It would be grossly unfair to deny these defendants the benefit of the Sanders ruling since the arguments made by defense counsel at the initial motion to suppress hearing and predating the Sanders opinion were identical to the U.S. Supreme Court ruling of *Arkansas* v. *Sanders,* 422 U.S. 537 (1979).

By the ruling of the Superior Court, Appellate Division, the narrow question is presented herein: "If Sanders is deemed applicable, this search is illegal" Appendix A p. 3. A ruling in this matter will eliminate the increasing conflict of case law among the Federal and State Judiciary, and the influx of litigation relating to same.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Superior Court, Appellate Division of the State of New Jersey.

Respectfully submitted,

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APPENDIX A

Opinion of the Superior Court of New Jersey, Appellate Division

(Filed—December 14, 1979)

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

A-2245-78

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

RAY B. FOSTER and ROBERT W. EPP,

Defendants-Appellants.

Argued: December 4, 1979—Decided: Dec 14, 1979

Before Judges Kole and Lane.

On appeal from Superior Court, Law Division, Salem County.

Mr. Thomas H. Ward argued the cause for appellant, Ray B. Foster (Messrs. Boakes, Lindsay and Smith, attorneys).

Appendix A

Mr. Daniel A. Zehner argued the cause for appellant Robert W. Epp (Messrs. Zehner & Zehner, attorneys). Mr. Ronald V. Smith, Deputy Attorney General, argued the cause for respondent (Mr. John J. Degnan, Attorney General of New Jersey, attorney).

PER CURIAM

Defendants pleaded guilty to unlawful possession of marijuana and possession thereof with intent to distribute. They appeal solely on the ground that their motion to suppress evidence should have been granted by the trial judge, since the police officer who had stopped the car in which they were travelling unconstitutionally searched luggage contained in the trunk of defendant Epp's automobile without a warrant.

From our review of the proofs at the hearing on the motion to suppress, we are satisfied that the findings of fact by the trial judge are supported by sufficient credible evidence and are therefore unassailable. We have furter concluded that, predicated on such findings, the judge properly held that the search and seizure was constitutional.

Defendants contend that the police officer's claim that he smelled the odor of unburned marijuana did not constitute probable cause for the search of the automobile and that, in any event, there were no exigent circumstances justifying the warrantless search of the suitcases and duffel bags contained in the trunk of the automobile.

This trained police officer's detection of the strong odor of unburned marijuana emanating from the automobile and particularly from the trunk thereof, as well as his observation of cigarette papers in the glove compartment, consti-

tuted sufficient probable cause for him to search the vehicle, including the trunk, for marijuana. He first detected the strong smell of marijuana when the right front door of Epp's automobile was opened but could not pinpoint the source thereof even by a visual inspection of the vehicle's interior. He thus reasonably could have concluded, as he did, that the odor came from the trunk. See, *State* v. *Harrison,* 111 Ariz. 508, 533 P. 2d 1143 (Sup. Ct. 1975); *People* v. *Cook,* 13 Cal. 3d 663, 119 Cal. Rptr. 500, 532 P. 2d 148 (Sup. Ct. 1975), *cert.* den. 423 U.S. 870, 96 S.Ct. 135, 46 L.Ed. 2d 100 (1975); *Ford* v. *State,* 37 Md. App. 373, 377 A. 2d 577 (Ct. Spec. App. 1977). See also, *United States* v. *Hosch,* 577 F. 2d 963 (5 Cir. 1978); *United States* v. *Thompson,* 558 F. 2d 522, 524 (9 Cir. 1977), *cert.* den. *sub. nom. Reeve* v. *United States,* 435 U.S. 914, 98 S.Ct. 1466, 55 L.Ed. 2d 504 (1978). *Cf. Johnson* v. *United States,* 333 U.S. 10, 13 (1948) in which the court indicated that detection of opium odors by trained individuals could constitute probable cause. Contrast the fact situation in *State* v. *Patino,* 163 N.J.Super. 116, 122-123 (App. Div. 1978), certif. granted 79 N.J. 477 (1979).

There were also sufficient exigent circumstances here under the then law justifying the warrantless search of the suitcases contained in the trunk of Epp's automobile. The thrust of defendant's argument on this issue is that since defendants had been arrested, handcuffed and placed in the patrol car prior to the time the luggage was actualy opened, the luggage and its contents were under the exclusive dominion and control of the arresting officer prior to the search thereof. Thus, it is said, there was no exigency which would justify the subsequent warrantless search.

We agree with the trial judge that *United States* v. *Chadwick,* 433 U.S. 1 (1977) is inapplicable, since under

the facts here the search of the luggage came within the automobile exception to the warrant requirement. In *Chadwick,* the court did not address the issue of the propriety of searching luggage in a moving or readily movable automobile, noting that the government did not contend "that the footlocker's brief contact with Chadwick's car made this an automobile search * * *." 433 U.S. at 11. *Chadwick* simply considered the privacy interests relating to the search of a footlocker, but not in connection with the automobile exception to the warrant requirement. In *Chadwick* the defendants were arrested after the footlocker had been placed into the trunk of a waiting automobile, and while the trunk of the car was still open and the car engine had not even been started. In the present case the automobile itself was used to transport the suitcases containing the contraband. See, *State* v. *Gray,* 59 N.J. 563, 568-569 (1971); *State* v. *McCarthy,* 130 N.J.Super. 540, 543-545 (App. Div. 1974). See also, *State* v. *Murray,* 151 N.J. Super. 300, 308-309 (App. Div.) certif. den. 75 N.J. 541 (1977).

Recently, however, in *Arkansas* v. *Sanders,* —— U.S. ——, 61 L.Ed. 2d 235 (1979) the Supreme Court did hold that once the police had the luggage exclusively within their control, as here, even though it was in an automobile that had been transporting it, the automobile exception did not apply and a warrant was required before the luggage could be searched. It found no justification for the extension of the automobile exception to a warrantless search of the contents of personal luggage merely because it was located in an automobile lawfully stopped by the police. If *Sanders* is deemed applicable to this case, the search and seizure here was unlawful. There is no proof that the police officer feared destruction or removal of evidence from the luggage if a warrant were

first obtained; nor do we find persuasive the State's contention that defendants lacked an expectation of privacy in the luggage since a plastic bag protruded from one of the suitcases. The record does not indicate that the police officer could actually see through the plastic bag or was aware that there was marijuana in it until he actually squeezed the bag.

We hold, however, that, essentially for the reasons expressed in *State* v. *Howery,* 80 N.J. 563 (1979), *Sanders* is not retroactive to a search and seizure which occurred prior to the date of its determination. The search here occurred in February 1977. Compare, *State* v. *Pace,* —— N.J.Super. —— (App. Div. 1979) where the matter of retroactivity of *Sanders* was not discussed and apparently not raised.

We note that the police officer here was alone and reasonably believed that, under the then existing law, given probable cause to search an automobile on the highway even though the defendants were under arrest, exigent circumstances justified the warrantless search of the suitcases here involved. See, *State* v. *Gray, supra; State* v. *McCarthy, supra.* See also, *State* v. *Parker,* 153 N.J.Super. 491, 487 (App. Div. 1977).

We find no indication that our courts anticipated the holding in *Sanders. State* v. *DeLorenzo,* 166 N.J.Super. 483 (App. Div. 1979) and *State* v. *Parker, supra,* relied on by defendants, deal with the search of bags or luggage already secured in police facilities, rather than the search of luggage stored in a car stopped on the highway. They are thus distinguishable from *Sanders.*

Affirmed.

A True Copy

ELIZABETH MCLAUGHLIN
Clerk

APPENDIX B

Order of the Supreme Court of New Jersey Denying Certification

(Filed—February 27, 1980)

SUPREME COURT OF NEW JERSEY
C-463 SEPTEMBER TERM 1979

STATE OF NEW JERSEY,

Plaintiff-Respondent,

vs.

RAY B. FOSTER and ROBERT W. EPP,

Defendants-Petitioners.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-2245-78 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 26th day of February, 1980.

A True Copy

STEPHEN W. TOWNSEND
Clerk